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ALEXANDER L. STEVAS,
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NO. 82-2050

IN THE

Supreme Court of the United States

October Term, 1982

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, et al.,
Petitioners,

v.

H. ANITA LINCOLN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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While Respondent Lincoln nowise disputes the truth of the facts stated in our Petition for Certiorari, Respondent takes umbrage over our reference to her EEOC charge, saying:

> "First and foremost, the Court should deny Petitioner the writ, because it is now attempting for the first time to assert defenses by the introduction of evidence that was not presented to the trial court. The petition at page 15, presents excerpts from Respondent's EEOC charge which was never tendered, much less introduced into evidence and therefore is not a part of the record." Brief in Opp. p., 8.

According to Respondent our presentation of these "excerpts from the EEOC charge" (the truthfulness and accuracy of which Respondent doesn't question) is "improper" because it is "outside of the record". *See* Brief in Opp., p. 5.

We would respectfully suggest that under the extraordinary circumstances of this particular case, Respondent's view of "propriety" is a bit myopic. The fact of the matter, and the reason for the filing of our Petition for Certiorari in the first place, is that the "claim" which the court below adjudicated as the basis for Petitioner's liability (*i.e.*, a "constructive discharge" *in 1977*) is itself entirely "outside the record". As we would have hoped to have made clear in our Petition, the Record (wholly without reference to the EEOC charge) shows from start to finish that the Title VII claim which Respondent in fact alleged and tried, related to a *1978* decision not to offer Respondent a faculty employment contract *for academic year 1978-1979*. In addition to what we have already pointed to respecting Respondent's unequivocal assertions that this is what her claim was (*see* Petition, pp. 9-10), it may be noted that the amendment to the

complaint which Respondent has appended to her Brief in Opposition before this Honorable Court once again reflects this plain fact that her complaint is about the "failure to rehire her for the academic year 1978-79". Brief in Opp., p. 12.

Certain it is that nothing in the Record shows, suggests, or even hints that Respondent ever thought of, much less asserted, a Title VII claim based upon a "constructive discharge" a year earlier (*i.e.*, in 1977). Under the circumstances we would respectfully submit that our reference to Respondent's EEOC charge, a reference made principally to show that the deprivation of "due process" which forms the basis of our Petition for Certiorari (*i.e.*, the deprivation occasioned by the positing of liability on a "claim" which wasn't alleged, tried or even thought of until after the trial was over and all opportunity to defend past) was real rather than merely theoretical in terms of substantial defenses being available to petitioner had the claim (*i.e.*, the purported 1977 "constructive" discharge) ever been made, is not "improper".

The second point of Respondent's Brief in Opposition which perhaps merits some response is Respondent's contention that Petitioner "stipulated" the timeliness of Respondent's EEOC charge. Suffice it to say that our stipulation of timeliness had reference to the claim which Respondent alleged and tried (*i.e.*, the *1978* decision not to offer Respondent a faculty contract for academic year 1978-79), not to a claim which wasn't alleged, tried, suggested, or so far as we are aware even thought of by anyone until after the trial was over (*i.e.*, the so-called "constructive discharge" *in 1977*).

Our Petition for Certiorari rests not on what the evidence shows respecting the defenses which were available

to Petitioner to meet the "claim" never made until the trial was over, but rests upon the fact that Petitioner manifestly has been deprived of the opportunity of presenting any defense whatsoever where the claim didn't come into being until the trial was over. It is this lack of elementary fairness in a federal judicial proceeding, something we believe goes to the very heart of "due process", which has caused us to view the decision below as being worthy of consideration by the Supreme Court of the United States.

Respectfully submitted,

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